

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF IOWA  
WESTERN DIVISION

CITY OF SIOUX CENTER,

Plaintiff,

vs.

BURBACH MUNICIPAL AND CIVIL  
ENGINEERS, n/k/a BURBACH  
AQUATICS, L.L.C.

Defendant and  
Counterclaim  
Plaintiff,

And

PAUL CLOUSING AND DAVID  
RUTER,

Additional  
Defendants on  
Counterclaim.

No. C00-4040-DEO

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

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The above captioned action came for trial before this Court, without a jury, on June 4 and 5, 2001. Curtiss D. Smith appeared on behalf of the Defendant and Counterclaim Plaintiff Burbach Municipal and Civil Engineers ("BMCE"). Paul Lundberg appeared on behalf of the Plaintiff, City of Sioux Center, Iowa (the "City"), and for Additional Defendants on Counterclaim, Paul Clousing ("Clousing") and David Ruter ("Ruter").

Prior to trial, the Court granted Plaintiff's motion for summary judgment on its complaint seeking a declaratory judgment that the contract between the City and BMCE was invalid and unenforceable because it had not been properly approved by the

City Council. The Court also granted summary judgment dismissing Count I of Burbach's Counterclaim, seeking a declaratory judgment that the contract was valid and enforceable, and compelling arbitration.

The action proceeded to trial only on Count II of Burbach's Counterclaim, seeking damages for intentional misrepresentation against the City, Clousing and Ruter. After careful consideration of the parties' written and oral arguments, as well as the relevant case law and evidence submitted at trial, the Court finds in favor of BMCE and against defendants Clousing and the City of Sioux Center.

#### **FINDINGS OF FACT**

1. BMCE is a sole proprietorship which is owned and operated by David F. Burbach, ("Burbach") with its principle place of business located in Platteville, WI., which is also Burbach's residence. BMCE is engaged in business as an engineering firm specializing in the consulting for and design of aquatic facilities, including swimming pools.
2. The City is a municipal corporation organized and existing under the laws of the State of Iowa. Clousing and Ruter are residents of Sioux Center, Iowa and employees of the City. Clousing has been the Assistant City Manager since 1995 and Ruter has been the City Recreation Director since 1975.
3. This Court has subject matter jurisdiction over this action under 28 U.S.C. § 1332 because it is an action between

citizens of different states and the matter in controversy exceeds \$75,000.

4. In 1996, the City was exploring options for renovation or replacement of the City's indoor swimming pool. In early to mid October 1996, Clousing attended the Iowa League of Municipalities Convention in Des Moines at which BMCE had a booth displaying its services. At this time, Burbach and Clousing met for the first time and spoke about BMCE's capabilities and services.
5. On October 22, 1996, BMCE sent Clousing a four page letter ("mini proposal") describing BMCE's services. (Pl. Ex. 1) The letter describes the three phases of work BMCE performs on an aquatic project. Phase I is a feasibility study, Phase II involves design services and Phase III involves construction management. While the letter discussed all three phases of services, it also stated on page one , "Our firm's recommendation is for Phase 1, Task 1 followed by Task 2." Task I was the technical evaluation of the existing pool and Task II was the marketing study.
6. On February 27, 1997, Clousing and Burbach had a telephone conversation during which Burbach and Clousing discussed BMCE's fees for the Phase I services involving evaluation of the existing pool and the marketing study. The total fee estimated by Burbach for Phase I, Tasks I and II was \$7,500. Clousing asked Burbach if BMCE would enter into a contract with the City to perform Phase I services only. Burbach advised Clousing that it was BMCE's policy not to

perform only Phase I services, and that BMCE required a contract that included all three phases of service.

7. On February 28, 1997, BMCE sent a 48 page Proposal (Pl. Ex. 2) to Clousing and the City. The proposal was accompanied by a cover letter. (Pl. Ex. 3) The proposal and cover letter described in detail BMCE's three phase approach to development of an aquatic facility, and proposed fees for all three phases. The cover letter (Pl. Ex. 3) stated in Paragraph 3, "Our firm's recommendation is for Phase 1, Task 1 followed by Task 2." Clousing testified that this language which also appeared in the October 1996 letter from BMCE (Pl. Ex. 1), convinced Clousing that BMCE would perform the Phase I preliminary work without an agreement as to Phase II or III. This testimony by Clousing was strongly contested and is discussed later on pages 13 through 18 of this ruling.
8. In early March 1997, Burbach came to Sioux Center, Iowa and made a presentation to the City's Recreation and Arts Council concerning his proposal. During the presentation, Burbach described BMCE's three phase approach and made it clear that if the City agreed to do business with BMCE they would be "married" for the entirety of the project. Ruter testified that it was his impression from Burbach's presentation that the City could in fact utilize BMCE's services for Phase I and then decide whether to go forward with a project BMCE or some other designer.
9. In May 1997, the City planned to drain its indoor pool for

maintenance. The City only drained the pool every three years. The City knew that the pool had problems and leaks, and understood that the pool needed to be empty for a thorough evaluation. It is contended with some credence that Ruter and Clousing were desirous of having Burbach on hand to evaluate the City's indoor pool because of the imminent pool draining.

10. On April 8, 1997, Ruter went before the City Council and requested authorization to pay BMCE \$3,000.00 for the evaluation of the City's existing indoor pool. (Def. Ex. A) The City Council passed a motion authorizing BMCE to perform the evaluation at a cost not to exceed \$3,000.00
11. On April 9, 1997, Ruter called BMCE and talked to Roger Schamberger ("Schamberger"), BMCE's Director of Marketing. There is a dispute in the evidence as to what transpired during this conversation. Ruter testified that he told Schamberger that the City Council had approved the \$3,000.00 study of the existing pool (Phase I Task I) and that Ruter wanted to schedule the evaluation to coincide with the scheduled draining and cleaning of the pool in early May. Schamberger testified that Ruter told him that the City Council "has accepted your proposal" Schamberger and Burbach both testified that this statement meant to them that the City Council had authorized BMCE's entire three phase proposal as set out in exhibit 2.
12. On April 9, 1997, BMCE sent Clousing (Assistant City Manager) a letter and its proposed standard contract for

Clousing's review and signature. (Pl. Ex. 5) The proposed contract included all three phases of service, and it included the same description of, and prices for, all three phases that had been included in the proposal. Clousing reviewed it and contacted Burbach to discuss revisions. Clousing did not show the proposed contract to the City Manager, the City Attorney, the Mayor or the City Council.

13. On April 17, 1997, Burbach and Clousing discussed the contract over the telephone. Clousing requested three changes to the proposed contract. First, he requested that the word "exclusive" be deleted from Paragraph 12.3.7 on page 15. Clousing explained that he wanted this change because he did not want the City to be required to use BMCE for additions to the project after it had been completed. Second, he requested that the words "as designed by Burbach Municipal and Civil Engineers" be added at the end of the first sentence of Paragraph 12.3.7 on page 15 and on the Project description on the first page. Third, he requested that an amendment be added that would require written authorization from the City before any Phase or Task be commenced by BMCE. Burbach agreed to these changes.
14. On April 17, 1997, Burbach faxed Amendment #1 to the proposed contract to Clousing, which incorporated the changes that were agreed upon. Clousing signed and executed the amended revised contract. Clousing did not seek or obtain the consent or approval of the City Council

of the City of Sioux Center to execute the contract on the City's behalf.

15. On April 2, 2001, this Court entered an order ruling that the contract executed by Clousing was void under Iowa law because the City Council had not passed a motion or resolution authorizing the contract.
16. Clousing's explanation that he believed that the contract only obligated the City to use BMCE for Phase I services is not credible in light of his prior conversations with Burbach and the express language still in the contract after which he had negotiated said proposed contract.
17. Previously, Clousing had signed contracts on behalf of the City, including large contracts for industrial development projects. On at least four prior occasions, Clousing had signed contracts on behalf of the City without prior approval of those contracts by the City Council. City Manager Harold Schiebout knew of these prior "unauthorized contract signings" by Clousing, but Clousing was never disciplined for these acts.
18. After execution of the amended agreement by Clousing, BMCE completed Phase I Task I, the technical evaluation of the existing pool; Phase I Task II, the marketing study; and Phase I Task III, the public opinion poll. For all three of these tasks, the City Staff requested and received City Council authorization. (Pl. Ex. 7)
19. BMCE completed all of Phase I work. BMCE provided the City with a detailed written evaluation of the existing pool

(Pl. Ex. 9 & 10), a Feasibility and Marketing Study (Pl. Ex. 12 & 13), and the results of the Public Opinion Poll (Pl. Ex. 16). Without the knowledge of BMCE, the City obtained a critique of the Feasibility and Marketing Study from a local architectural firm, which was complimentary of BMCE's report.

20. The City of Sioux Center paid BMCE for the completion of its work in Phase I.
21. BMCE's Feasibility and Marketing Study recommended that the City proceed with an aquatic project that included a zero depth entry type of pool with several amenities, and replacement of the indoor pool within the existing natatorium. (Pl. Ex. 13, pp.41-66). BMCE also provided a proposed site plan for the proposed project, which included at the request of the Recreation and Arts Council, an indoor hockey arena. (Pl. Ex. 13, p. 70 and Pl. Ex. 19).
22. BMCE's Feasibility and Marketing Study contained an Opinion of Probable Construction Cost for the proposed aquatic project in the amount of \$3,321,500. Based on this construction cost, BMCE's fee for the Phase II and Phase III services would have been \$399,500. (Pl. Ex. 13, p.68-69).
23. Burbach and Schamberger had a number of conversations with City employees during the time BMCE performed Phase I services. Burbach made approximately 12 trips to Sioux Center. During this period, no City employee ever questioned the validity of the contract between BMCE and



the City.

24. Burbach testified that he purposely keeps his fees low on the Phase I Tasks in order to induce municipalities to sign on with his firm for Phase II and Phase III. Burbach claims that his firm expended an additional \$40,000. in unpaid time to accomplish Phase I, in reliance on the contract executed by Clousing. This amount of loss is an estimation only.
25. In October 1999, City employee Clousing informed Schamberger that the City and its two partners, Dordt College and the Sioux Center School District, were looking at other architects for the project.
26. On October 9, 1999, Burbach sent Clousing a letter wherein Burbach stated his position that he had an enforceable contract with the City to construct the entire project.
27. After talking to Clousing, Burbach called Roger Evans, Chair of the Recreation and Arts Council, to discuss the City's option. On November 1, 1999, Burbach sent a letter to Evans discussing the contract negotiations and his understanding of the contract. (Pl. Ex. 17).
28. On December 9, 1999, a meeting was held in Sioux Center involving the Recreation and Arts Council, Mr. Clousing, Mr. Schiebout, the City Attorney and Mr. Burbach. At this meeting, Burbach was informed for the first time that the City Council had never authorized the contract executed by Clousing and that it was the City's position that the contract was invalid. This was over 31 months after

Clousing signed the amended contract. Burbach insisted that BMCE had a valid contract with the City for all three phases of the project. Burbach expressed interest in continuing to work with the City on the aquatic project. He offered three alternatives for BMCE's continued involvement: (1) BMCE acting as the architect and engineer for the entire project but would hire a sub-consultant for the design of the ice arena, (2) BMCE acting as consultant for the aquatic portion of the project and hiring a new consultant for the design of the ice arena, or (3) BMCE handling the outdoor aquatic center only and the City hiring separate consultants for the ice arena and the natatorium.

29. In a letter, dated December 28, 1999, (Def. Ex. H), the City informed Burbach that it had rejected all of its alternatives and would be sending out a request for proposals from other firms to get new ideas regarding the aquatic/ice arena project. The City sent a request for proposal to Burbach. (Def. Ex. L) Burbach did not respond to the request for proposal because it was his position that he already had a valid contract with the City.
30. The Request for Proposal issued by the City in January 2000, described a project virtually identical to the one described in BMCE's Feasibility and Marketing Study (Pl. Ex.13), and estimated the total cost at \$5,500,000. As a result of interviewing candidates who responded to the City's Request for Proposals, the City hired Ankeny Kell

Architects of St. Paul, Minnesota.

31. Since January 2000, the City has pursued an aquatic project that is much like the project described in BMCE's Feasibility and Marketing Study (Pl. Ex. 13) and the Site Plan contained therein. The City has entered into joint powers agreement with the Sioux Center School District and Dordt College for the design and construction of the aquatic facility. The proposed facility will be owned by the City.
32. The City has obtained grants from the Iowa Department of Natural Resources in the amount of \$100,000 and from the State of Iowa in the amount of \$2,750,000 for the project. The City has obtained a loan from the State of Iowa for \$250,000. The School District has successfully completed a bond referendum to raise its share of the costs for the project. The City is planning to issue general obligation bonds for its share of the cost of the project, which does not need to be voted on in a referendum. Dordt College has agreed to its contribution to the project as well.
33. The City has requested a proposal from Ankeny Kell Architects for the design and construction observation services for the project. The City anticipates asking for bids for the project later in 2001, with construction to commence in 2002. The anticipated cost for the project is now \$8,500,000, including the ice rink. The current budget for the aquatic portion of the project is \$5,500,000. (Clousing testimony).

34. At all times material to this litigation, Clousing was acting in his capacity as Assistant City Manager for the City. All of his acts in dealing with BMCE, except for his signing of the amended contract without approval from the City Council, were in furtherance of his official duties and City business. Clousing did not act for his own personal business or interest when dealing with BMCE.
35. At all times material to this litigation, Ruter was acting in his capacity as Recreation Director and Pool Manager for the City. All of his acts in dealing with BMCE were in furtherance of his official duties and City business. Ruter did not act for his own personal business or interest when dealing with BMCE.

#### **CONCLUSIONS OF LAW**

1. The Court has personal jurisdiction over the parties herein and subject matter jurisdiction of this claim.
2. On June 4, 2001, a bench trial was held on Count II of Burbach's Counterclaim for intentional or fraudulent misrepresentation against the City of Sioux Center, Paul Clousing and David Ruter. Count I of Burbach's Counter Claim for Declaratory Judgment, and the City of Sioux Center's initial claim for Declaratory Judgement were resolved by this Court's ruling on the City of Sioux Center's Motion for Summary Judgement.
3. The only claim asserted by Burbach against Ruter and

Clousing still remaining is for intentional or fraudulent misrepresentation. The theory of negligent misrepresentation is not available to Burbach against either the City or its employees. The Iowa Supreme Court has held that the tort of negligent misrepresentation applies only to those defendants in the profession or business of supplying information or opinions to others. Freeman v. Ernst & Young, 516 NW2d 835, 838 (Iowa 1994). The City and its employees are not in the business of supplying information or advice to others and therefore cannot be liable to Burbach for negligent misrepresentation.

4. Under Iowa law, the elements for fraudulent or intentional misrepresentation are:
  - a. The defendant made a representation to plaintiff.
  - b. The representation was false.
  - c. The representation was material.
  - d. The defendant knew the representation was false.
  - e. The defendant intended to deceive plaintiff.
  - f. The plaintiff acted in reliance on the truth of the representation and was justified in relying on the representation.
  - g. The representation was a proximate cause of the plaintiff's damage.
  - h. The amount of damage. (Iowa Civil Jury Instruction 810.1; City of McGregor v. Janett, 546 NW2d 616, 619 (Iowa 1996)).
5. Each element of fraudulent misrepresentation must be proved by a preponderance of clear, satisfactory, and convincing evidence. Iowa Civil Jury Instruction 810.1;

Raim v. Stancel, 339 NW2d 621, 624 (Iowa Appellate 1983). For evidence to be "clear and convincing", it is merely necessary that there be no serious or substantial doubt about the correctness of the conclusion drawn from it. Id.

#### **A. CLAIM AGAINST DEFENDANT CLOUSING**

6. The Court has analyzed the plaintiff's intentional or fraudulent misrepresentation claim against defendant Clousing. The plaintiff has carried its burden of proof of clear, satisfactory and convincing evidence that Clousing made false representations intended to deceive plaintiff.
7. As to defendant Clousing, the Court is persuaded that Clousing made the following intentional misrepresentations to BMCE in connection with the contract: (1) that the City Council had approved the contract sent by BMCE, (2) that Clousing had authority to sign the contract, and (3) that the City intended to hire BMCE for all three phases of the aquatic project.
8. The intentional misrepresentations made by Clousing were material to BMCE because BMCE would not have proceeded to perform Phase I services unless the City agreed to a contract for all three phases. Clousing did not deny Burbach's testimony that he expressly stated that BMCE would not perform only Phase I services. This testimony is un-refuted and Clousing knew of BMCE's contractual

- requirements for performing services for the City
9. The representations were false because at the time he made the misrepresentations, Clousing knew that the City Council had not approved the contract, that he did not have the authority to obligate the City to the contract, and that the City did not intend to hire BMCE for all three phases if the project was built.
  10. At the time he made the intentional representations to BMCE, Clousing knew BMCE would not agree to an agreement that covered only the Phase I services because Burbach had specifically told Clousing that BMCE would not do so.
  11. Clousing's testimony regarding his interpretation of the amended contract is not credible. It is true that in both Exhibit 1 and Exhibit 3, as Clousing points out, the words "Our firms recommendation is for Phase I, Task I followed by Task II are included." However, the way Clousing tries to rely on them is unacceptable. It ignores the words just before which flatly say "Our contract would include these three phases of service." Further, Clousing's interpretation is in direct conflict with the express terms of said amended contract. A paragraph that Clousing requested to be changed and which was changed at his request (Paragraph 12.3.7, Pl. Ex. 6, p.15) clearly states, after his amendments, that the City and BMCE would be "bound for the life of the Project, which is through completion of the Project as designed by" BME. The paragraph goes on to say that "[t]his is a contract for performance of all the consulting work on

this project, including all phases of professional services as specified herein." The professional services described clearly covers all three phases, including design (Phase II) and observation during construction (Phase III). (Pl. Ex. 6, p. 17-25). Clousing admitted that he never asked to have any of this language deleted.

12. BMCE was justified in relying on Clousing's intentional misrepresentations because Clousing had been identified as the official contact person for the project, and BMCE had no reason to doubt that Clousing had obtained approval of the contract from the City Council prior to signing. BMCE never had a situation arise previously where a city employee signed a contract that the city later claimed had been unauthorized. It would not have been reasonable or common business practice for BMCE to request written proof of Clousing's authority to sign the contract.
13. The fact that BMCE may have performed only Phase I services on a couple other projects (i.e. Maplewood), does not support the City's argument that Burbach should have known that the City only intended to use Burbach for Phase I services. Those projects were exceptions to BMCE's normal business practice of contracting to perform all three phases of a project.
14. Clousing intended for BMCE to rely and act upon his misrepresentations. Clousing and the City were in a hurry to have BMCE evaluate the existing pool while it was drained in May for maintenance. Since the City only



drained the pool once every three years, it was important for the City to have BMCE think they were under contract by May 1997. BMCE was the only consultant that was available to perform the evaluation that the City badly needed. Clousing knew that BMCE would not do any work, including the much needed evaluation of the existing pool, unless the City agreed to a contract for all three phases. So, Clousing deceived Burbach, told him, in effect, you have the job and the first thing you have to do is come here while our pool is drained, inspect it, and tell us what to do and how to do it. Burbach never would have made the pool inspection unless that was the situation.

15. It is clear that Clousing knew what he was signing, and knew that the contract could not be enforced against the City by BMCE if the City later chose to avoid it due to the lack of City Council approval. In this way, Clousing obtained all the benefits of the contract for the City, without any of the obligations for future services.
16. The fact that Burbach testified that at the meeting on December 9, 1999, Clousing and the City Manager's position was that they were just committed under the contract through Phase I, does not change the situation, which is that Clousing intentionally misrepresented to Burbach the City's intentions with respect to BMCE doing the entire project. Burbach also testified that at this meeting he reminded the representatives of the City, (including Clousing), of how he had used the term

"married" in his presentation to the City's Recreation and Arts Council in March, 1997.

17. The fact that Clousing had the proposed contract amended is significant. A November 1, 1999 letter from Burbach to Roger Evans, Chairman of the Joint Use Committee for the City, demonstrates that Clousing wanted to amend the proposed contract so the that it would not bind the City to BMCE "forever." (Pl. Ex. 17). The fact that Clousing wanted to amend the proposed contract shows that Clousing was aware that the proposed contract bound the City and BMCE for all three phases of the project. Clousing admitted at the trial that, in retrospect, he should have amended the proposed contract more carefully and more fully.
18. In an April 28, 1998 letter from Clousing to Burbach, Clousing informs Burbach that the City Council had approved BMCE to perform Phase I, Task 3. Clousing also refers to the proposed contract and Amendment No. 1 to said contract which clearly stated that BMCE would be performing Phase I, II and III of the project. The City never raised the issue of the validity of the contract with Burbach until December, 1999, some 34 months after it was "amended."
19. Under Iowa law, the measure of damages for false representation is under the benefit of the bargain rule. Air Host Cedar Rapids, Inc. v. Cedar Rapids Airport Commission, 464 N.W. 2d 450, 454 (Iowa 1990)(Iowa Supreme Court upheld an award for lost profits where municipal airport commission was found to have misrepresented its

intentions to grant a lease on a new facility to an existing concessionaire.) This rule of damages gives the damaged party the equivalent of what the party would have received if the agreement would have been completed.

*Black's Law Dictionary*, 6th Edition. The purpose of the benefit of the bargain rule is to put the defrauded party "in the same financial position as if the [intentional or] fraudulent misrepresentation had been in fact true." Cornell v. Wunschell, 408 N.W. 2d 369, 380 (Iowa 1987), citing D. Dobbs, *Handbook on the Law of Remedies* §9.2 at 595 (1973). In this case, a judgment of \$199,750 , for reasons set out below, best fits this rule.

20. As a direct result of Clousing's misrepresentations BMCE suffered damages consisting of the profits it would have made in performance of Phases II and III of the contract. Based on the Opinion of Probable Cost contained in the Feasibility and Marketing Study (Pl. Ex. 13, p.69), BMCE's fee for Phases II and III would have been \$399,500. BMCE's average profit margin for this work has been approximately 50% over the last three years. Accordingly, BMCE's lost profits are **\$199,750** (\$399,500 × 50%).

#### **B. CLAIM AGAINST DEFENDANT RUTER**

21. The Court has analyzed the plaintiff's fraudulent misrepresentation claim against defendant Ruter. As set out on the previous pages of this order, defendant Clousing was right in the middle of all of the dealings

with Burbach and was indeed the "point man" for the City on the pool job. The defendant Ruter, as City Recreation Director, did not have anywhere near the contacts and conversations with Burbach that Clousing did. The evidence does not clearly show that Ruter knew enough or did enough to persuade the Court that he intentionally misrepresented material facts to Burbach as Clousing did, all as set out on pages 13 through 18 of this order. The case against the defendant Ruter is dismissed.

### **C. CLAIM AGAINST DEFENDANT "THE CITY"**

22. Under Iowa law, a municipality can be held liable for the torts of its officers and employees acting within the scope of their employment or duties. Iowa Code §670.2; City of McGregor v. Janett, 546 N.W. 2d 616 (Iowa 1996). This Court has found that employee Clousing did in fact commit a tort against BMCE. During the three or more years after Clousing signed the contract he was in steady contact with Burbach, intentionally misleading him at every turn, never telling him that he did not have a deal for the whole project.

23. The law involved is set out in Iowa Code §670.2, which up until 1993 was in §613A.2. Section 670.2 states in pertinent part:

Except as otherwise provided in this chapter, every municipality is subject to liability for its torts and those of its officers and employees, acting within the scope of their employment or duties, whether arising out of a government or

proprietary function. For purposes of this chapter, employee includes a person who performs services for a municipality...

For purposes of the governmental tort liability statute, a city is a municipality. Fettkether v. City of Readlyn, App. 1999, 595 N.W. 2d 807. Generally, the governmental tort liability statute subjects municipalities to liability for their torts and those of their officers and employees. Id. Iowa Code §670.2 makes a municipality liable for the torts of its officers and employees "acting within the scope of their employment or duties." City of McGregor v. Janett, 546 N.W. 2d 616, 619 (Iowa 1996) citing City of West Branch v. Miller, 546 N.W. 2d 598, 600 (Iowa 1996); Strong v. Town of Lansing, 179 N.W. 2d 365, 367 (Iowa 1970).

Abrogation of governmental immunity means that the same principles of tort liability apply to municipalities and their employees as to other tort defendants except as limited by statute governing municipal liability. I.C.A. §613A.1 et seq. Hildenbrand v. Cox, 1985, 369 N.W. 2d 411. Iowa Code §670.2 authorizes claims against a county for its torts and those of its officers, employees and agents acting within the scope of their employment or duties, whether arising out of a governmental or proprietary function. Prior to the 1967 enactment of this section, a county's liability had been limited to torts arising out of proprietary activities only. Op. Atty. Gen., Dec. 31, 1968 (No. 68-12-33). Proprietary functions are designed to promote comfort, convenience,

safety and happiness of citizens, which of course includes swimming pools. *Black's Law Dictionary*, 6th Edition. Since this section withdraws sovereign immunity from counties for torts committed by their officers, agents and employees, unless the claim is based on an act committed during the exercise of due care in the execution of a duty, as provided in §613A.1, the counties are liable for any torts committed by their officers, agents or employees in the absence of due care. Op. Atty. Gen. (Harthoon), Sept. 11, 1973.

24. At all times material to this action, Clousing was acting in his capacity as a City employee, and in furtherance of the City's business when he made the intentional misrepresentations set out herein. Clousing was not acting within the scope of his employment when he signed the unauthorized contract, but at all other times (i.e. when he had Burbach come to evaluate the pool) there is no question that he was acting in his capacity as a City employee, all to the benefit of the City.
25. This verdict is not based on the "signed contract." This Court has previously ruled that said contract is void.

#### **CONCLUSIONS**

26. BMCE is entitled to recover from Clousing and the City, jointly and severally, the sum of **\$199,750**, which represents the profits BMCE lost on the project based on BMCE's Opinion of Probable Construction Cost contained in its Feasibility and Marketing Study.

27. The City is liable for the acts of Clousing under Iowa Code §670.2 because Clousing was acting in the scope of his employment with the City when he made the intentional misrepresentations set out to above.
28. The plaintiff shall take nothing from the defendant David Ruter

**ORDER FOR JUDGMENT**

29. The Clerk is directed to enter judgment in favor of Counterclaim Plaintiff Burbach Municipal and Civil Engineers against Paul Clousing and the City of Sioux Center, Iowa in the amount of **\$199,750**, plus its costs and disbursements.

**IT IS SO ORDERED.**

**DATED** this \_\_\_\_ day of November, 2001.

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Donald E. O'Brien, Senior Judge  
United States District Court  
Northern District of Iowa